IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 306 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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PLACHEM INDUSTRIES - Applicant(s)
Versus
ESSKAY PHARMACEUTICALS LTD. & 2 - Respondent(s)

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Appearance :
MR MILIND R KULKARNI for Applicant(s) : 1,
MR AR MAJMUDAR for Respondent(s) : 1, 3,
NOTICE UNSERVED for Respondent(s) : 2,
MR NK MAJMUDAR for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 22/09/2005

ORAL JUDGMENT

1.The applicant being the Partnership Firm has filed this application on or about 05.08.2003 making following prayers :-

[A] That the Hon'ble Court be pleased to pass an order restraining the Managing Director, Director, Officers of the respondent and other connected with the Management, control and day to day affairs of the respondent Company from selling, leasing, otherwise transferring or dealing with, in any manner, with the movable and immovable properties of Esskay Pharmaceuticals Limited;

[B] That the Hon'ble Court be pleased to appoint the Official Liquidator as Provisional Liquidator and be further pleased to direct him to take the stock of the affairs of the respondent Company;

[C] That this Hon'ble Court be pleased to initiate action for contempt of Court against the Managing Director and Sanjay Dhumal of the

respondent Company.

[D] That this Hon'ble Court be further pleased to initiate action for perjury against the Managing Director and Sanjay Dhumal of the respondent Company.

2. This application was dismissed for default by an order on 16.06.2003 for non-removal of office objections which were to be removed on or before 31.07.2003. The applicant has thereafter moved Misc. Civil Application No. 40 of 2004 for restoration of Company Application (Stamp Number) No. 333 of 2003. This Court vide order dated 30.07.2004 passed in Misc. Civil Application No. 40 of 2004 has restored the said Company Application and the new number given to the said application is Company Application No. 306 of 2004.

3. After filing of the present application, the respondent Company, namely, Esskay Pharmaceuticals Limited went into liquidation and hence, this Court

vide its order dated 14.12.2004 permitted the applicant to join Mr. Kirti Jain and Sanjay Dhumal as respondent Nos. 2 & 3 respectively and prayers [A] & [B] were permitted to be deleted while prayers [E] & [F] were permitted to be added in this application. The said prayers are as under :-

[E] The Hon'ble Court would be pleased to initiate action against the Ex-Managing Director Mr. Kirti Jain and Mr. Sanjay Dhumal, Ex-Director/Officer of the Company in liquidation for illegal misapplication of money of the Esskay Pharmaceuticals Limited (In Liquidation), misfeasance, under the provisions of the Companies Act, 1956.

[F] The Hon'ble Court would be pleased to make such preliminary inquiry under Section 340 of the Criminal Procedure Code for the offence referred to in Section 195(1)(b) of the Criminal Procedure Code against Mr. Kirti Jain, Ex-Managing Director and Mr. Sanjay Dhumal, Ex-Director/Officer.

4.Shri Nitinbhai K. Shah, Partner of the applicant Firm has filed affidavit in support of the Judge's Summons. Initially, Mr. D.V. Parikh, learned advocate was appearing for the applicant. Misc. Civil Application No. 40 of 2004 was filed on behalf of the applicant Firm by learned advocate Mr. Pavan Godiawala and thereafter, Mr. Milind R. Kulkarni, learned advocate has appeared on behalf of the applicant Firm.

5.It is the case of the applicant Firm that the respondent Company was not in a position to pay to the applicant a sum of Rs. 20,78,000/- outstanding as on 18.06.1997 with regard to the goods supplied by the applicant to the respondent Company along with interest thereon. The said amount outstanding as on 31.12.2002 is Rs. 44.40 Lacs. The Company Petition filed by the applicant Firm being Company Petition No. 289 of 1997 has been adjourned from time to time on the ground that the respondent Company had filed proceedings before BIFR and in

light of the provisions of SICA, the said petition could not be proceeded with. BIFR vide its order dated 16.12.2002 has rejected all prayers of the respondent Company and forwarded its opinion to this Court for winding up of the respondent Company. It is alleged in the present application that the proceedings before this Court as well as before BIFR demonstrated beyond a doubt that at each stage, the respondent Company has not only acted malafide, but has made false statements before various forums knowing the same to be false with a clear intent of deceiving this Court to its benefit and for defeating the rightful claims of the Creditor like the applicant Firm. It is further alleged that various overt acts aimed at misleading Courts by filing false affidavits and making false statements should not be treated lightly as the same would strike at the very root of the system of administration of justice and leads to it weakening. It is, therefore, stated that the false statements made by the respondent Company on various occasions have led to inordinate

delay in disposal of various matters and have also led to the applicant's claim being rendered ineffective and unenforceable. It is further alleged that because of the false statements made in the affidavit, a notice of perjury was issued by this Court. It is further alleged that though the settlement was arrived at, the same was disputed in subsequent proceedings. A false statement was also made to other statutory authorities to the effect that the Partner of the applicant Firm was not a Shareholder of the Company despite the fact that he was very much the Shareholder holding shares of the Company in his name. According to the applicant, several examples quoted in the application clearly demonstrated malafide, perjurious and contemptuous act of the Managing Director and other Directors as well as Officers of the respondent Company. In light of the said averments and allegations made in the affidavit filed in support of the Judge's Summons, prayer regarding stay against transfer of assets of the Company, appointment of the Official Liquidator as Provisional Liquidator, action for

Contempt of Court against the Managing Director and one Mr. Sanjay Dhumal of the respondent Company and initiation of action for perjury against the Managing Director and one Mr. Sanjay Dhumal were made. After the Company went into liquidation, amendment was made and further prayers with regard to the direction to the Official Liquidator for initiation of misfeasance proceedings against the Ex-Managing Director as well as Ex-Directors/Officers of the Company and also to make preliminary inquiry under Section 340 of Cr.P.C. for the offences referred to in Section 195(1)(b) of the Cr.P.C. against the Ex-Managing Director as well as Mr. Sanjay Dhumal, Ex-Director / Officer of the respondent Company, were made.

6.Mr. N.K. Majmudar, learned advocate appearing for respondent Nos. 2 & 3 has submitted, on the basis of affidavit-in-reply filed on 23.02.2005, that the application filed by the applicant in the present form is not maintainable. He has raised preliminary issue about the maintainability of the

present application as the order of winding up was already passed in Company Petition No. 289 of 1997 long back and at no point of time, the applicant has ever raised an issue or grievance which has been raised in the present application. He has further submitted that as soon as the winding up order is passed by this Court, the present applicant has lost its locus standi to make any submission or to raise any contention in respect of the proceedings of Company Petition No. 289 of 1997. Bare perusal of the reliefs prayed for by the applicant would make it clear that the applicant wants to achieve some oblique motive by preferring the present application which is not at all maintainable.

7. Mr. Majmudar has further submitted that by seeking amendment in the present application and by adding two more prayers, the applicant has tried to invoke the provisions of Section 195(1)(b) read with Section 340 of Cr.P.C. During the course of pendency of the proceedings for winding up before

the learned Company Judge, the applicant has not raised these contentions and once the proceedings have already come to an end, the said provisions cannot be invoked. The respondents have not made any false or misleading statement before the learned Company Judge during course of the winding up proceedings. He has further denied that the respondents have either made misleading or incorrect statements or any false evidence was submitted before the Court. He has, therefore, submitted that there is no question of invoking the provisions contained under Section 195(1)(b) read with Section 340 of Cr.P.C.

8. On behalf of the applicant Firm, affidavit-in-rejoinder was filed on 01.07.2005. More or less, same contentions which were raised in the application were reiterated in the rejoinder and certain instances were also quoted which form part of the proceedings before BIFR as well as proceedings of Company Petition No. 289 of 1997. Reference was also made to certain other criminal

cases which were filed against the Company as well as its Ex-Managing Directors and Directors/Officers of the Company. Based on these several averments and allegations, it was strongly urged in the rejoinder that the entire facts and circumstances of the present case clearly demonstrate that the persons who were in charge of the Management of the respondent Company especially the Promoters / Directors, Mr. Kirti Jain & Mrs. Saroj K. Jain, Mr. Sanjay Dhumal and its other Officers could not have been trusted and they have siphon off the funds, assets and valuable properties of the Company, both movable and immovable. It was further prayed in the rejoinder that this Court should take cognizance of the collective statements mentioned in the application as well as in the rejoinder and direct the Registrar of this Court to initiate strict action against the respondents and to file criminal complaints against them.

9. After having heard learned advocates appearing for the respective parties and after having gone

through the averments made in the application and affidavit-in-reply as well as affidavit-in-rejoinder and the documents produced therewith, the Court is of the view that basically there were six prayers made in the present application. The prayers namely (A) & (B) were deleted in view of the fact that the Company has gone into liquidation after filing of the present application. It is, however, strange that though the first two prayers were deleted and two more prayers were added, the applicant has not sought for the prayer to implead the Official Liquidator as a party on behalf of the respondent No. 1 Company. The cause title clearly reveals that respondent No. 1 is a Company and after the Company went into liquidation, only the Official Liquidator can represent the Company in liquidation. Be that as it may, there were serious disputes about the contentions raised by the present applicant with regard to contempt, perjury, invocation of the provisions contained in Section 195(1)(b) read with Section 340 of Cr.P.C. etc. The respondents have raised various

contentions while denying the allegations and averments made against them. The very fact that the Company went into liquidation itself proves that all was not well when the respondent Nos. 2 & 3 were in charge of the affairs of the respondent No. 1 Company. This was the reason that the Company could not survive and ultimately, it was ordered to be wound up. It is true that the defence raised by the respondent Nos. 2 & 3 at various stages of the proceedings either before this Court or before other Forums was not found to be sustainable. But it is difficult to arrive at the conclusion that the said defence was absolutely false to their knowledge. The Court, therefore, is not inclined to go into all these disputed matters in the present application and that too after expiry of several years. These issues became insignificance after the Company was ordered to be wound up. The only issue which materially survives now is with regard to initiation of misfeasance proceedings against the Promoters, Ex-Directors and/or Officers of the Company. It has come on

record of this Court that the Official Liquidator has already filed Criminal Case against the Ex-Directors for non-filing of statement of affairs being Criminal Case NO. 3 of 2005. During the pendency of the said Criminal case, the Statement of Affairs was filed. However, there were certain defects and hence, the Official Liquidator has called for the explanation and the said Criminal Case is still pending before this Court.

10.Considering the various averments and allegations made by the present applicant in these proceedings either in the memo of the Company Application or in rejoinder, the affairs conducted by the Ex-Directors including the respondent Nos. 2 & 3 are required to be minutely looked into and it prima facie gives rise to initiation of misfeasance proceedings against them. The Official Liquidator, though not a formal party in the present application, is, however, in charge of the affairs of the Company in liquidation is hereby directed to refer the matter to the Chartered Accountant out of

the panel maintained by him and obtain a report from him as expeditiously as possible and based on such report, initiate the proceedings against the Ex-Directors under Section 543 (1) of the Companies Act, 1956, so as to find out whether they have misapplied, retained or become liable or answerable for any money or property of the Company or they have been guilty of misfeasance or breach of trust in relation to the Company. The Official Liquidator is further directed to act on this issue very promptly and pursue the matter with the Chartered Accountant vigorously so that timely actions can be taken against the Ex-Directors of the Company.

11. Since the Court has issued the aforesaid direction with regard to initiation of misfeasance proceedings against the Ex-Directors of the Company for the discussion made hereinabove, the other issues raised in the present application are not dealt with minutely and even otherwise the Court is not prima facie satisfied about taking any action

at this stage against them in relation to those issues.

12.With the aforesaid directions and observations, this application is accordingly disposed of.

[K.A. PUJ, J.]

Savariya